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GLAXOSMITHKLINE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

SMITHKLINE BEECHAM CORPORATION, )  
d/b/a GLAXOSMITHKLINE, )  
Plaintiff, )  
vs. )  
ABBOTT LABORATORIES, )  
Defendant. )

Case No. 4:07-cv-05702 (CW)

**REPLY IN SUPPORT OF GSK'S  
MOTION TO MODIFY TRIAL  
SCHEDULE (DOCKET NO. 624)**

Judge: Honorable Claudia Wilken  
Hearing Date: March 19, 2015  
Time: 2:00 p.m.  
Location: Courtroom 2 (4<sup>th</sup> Floor)

1 Plaintiff GlaxoSmithKline (“GSK”) has moved to continue the start of trial by one week,  
 2 and to adjourn the trial on May 15, 2015 so that GSK’s counsel can fulfill his commitment to  
 3 Pepperdine University School of Law. Defendant Abbott Laboratories (“Abbott”) opposes GSK’s  
 4 request to delay the start of trial but does not oppose GSK’s request to adjourn the trial date on  
 5 May 15. GSK respectfully responds to Abbott’s opposition:

6 There is “good cause” for the Court to postpone the trial date by one week (commencing  
 7 trial on May 11, 2015 rather than May 4, 2015). Fed. R. Civ. P. 16(b)(4) (noting “good cause”  
 8 standard applies where Court has not entered the final pretrial order).<sup>1</sup> Abbott opposes GSK’s  
 9 request, but has not even claimed that it would suffer prejudice if the Court granted GSK’s  
 10 motion.

11 “District courts should generally allow amendments of pre-trial orders when ‘no  
 12 substantial injury will be occasioned to the opposing party, the refusal to allow the amendment  
 13 might result in injustice to the movant, and the inconvenience to the court is slight.’” *Campbell*  
 14 *Indus. v. M/V Gemini*, 619 F.2d 24, 27-28 (9th Cir. 1980) (quoting *Angle v. Sky Chef, Inc.*, 535  
 15 F.2d 492, 495 (9th Cir. 1976)); *see also Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996),  
 16 *as amended* (Jan. 15, 1997) (stating that the Ninth Circuit has “made it clear that district courts  
 17 should generally allow amendments of pre-trial orders” on showing of the *Campbell* factors);  
 18 *Almazni v. United Fin. Cas. Co.*, No. 5:14-CV-00975-CAS, 2015 WL 134066, at \*2 (C.D. Cal.  
 19 Jan. 7, 2015) (applying Rule 16(b) and granting a “brief, thirty day continuance” of the trial).  
 20 Motions to modify the scheduling order may be granted “for good cause and with the judge’s  
 21 consent.” Fed. R. Civ. P. 16(b)(4).

22 No substantial injury to Abbott: Abbott claims primarily that it “has relied on” the May 4  
 23 trial date. But Abbott does not claim that any of its fact or expert witnesses are unavailable to  
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25 <sup>1</sup> Abbott asserts that the applicable standard for modifying pretrial orders is “manifest  
 26 injustice” under Fed. R. Civ. P. 16(e). *See* Dkt. No. 625, at 1:8-10 (quoting the discussion of final  
 27 pretrial orders in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)).  
 28 However, the manifest injustice standard applies to orders entered “following a final pretrial  
 conference.” *Johnson*, 975 F.2d at 608 (citations omitted). As there has been no final pretrial  
 conference in this case, Rule 16(b)(4)’s “good cause” standard applies to GSK’s request.  
 Regardless of the standard, GSK’s request should be granted.

1 testify if the trial were to start on May 11, nor does Abbott claim that its counsel has any conflict  
2 with the one-week delay. Indeed, even with GSK's modification, the trial will take place almost  
3 entirely within the three-week window that the Court has already established and that, as Abbott  
4 says, the parties expected. Dkt. No. 625.

5 Injustice to GSK: By contrast, as discussed in detail in GSK's Motion, two of GSK's key  
6 witnesses will be unable to testify during the week of May 4, when trial is currently scheduled to  
7 begin. Dr. Prowse will be testifying at an arbitration in New York, and John Keller will be out of  
8 the country until May 11. Previously, these witnesses' scheduling conflicts were not significant  
9 because GSK did not expect to call them until the week of May 11. However, as GSK has filed an  
10 unopposed motion to drop its antitrust claims from the complaint, GSK expects that Dr. Prowse  
11 and Mr. Keller will be testifying much earlier in the trial.

12 Abbott's only response is that GSK could just change the order of its witnesses, but that  
13 may not be practical and may well confuse the jury and negatively impact GSK's effective  
14 presentation of its case. For example, Dr. Prowse will not be available to testify until some time in  
15 the middle of the week of May 11. That is, if the trial begins on May 4, Dr. Prowse would be able  
16 to testify no earlier than the 7th or 8th day of what GSK expects to be a ten-day trial, in the middle  
17 of Abbott's trial presentation.

18 Slight inconvenience to the Court: Finally, GSK submits that the inconvenience to the  
19 Court will be slight in comparison to the overall reduction in trial time. As Abbott notes, assuming  
20 a 10-day trial beginning on May 11 but with a continuance on May 15 will result in the trial  
21 ending on Tuesday, May 26. This date was not originally scheduled for trial. However, where the  
22 trial was originally scheduled for three weeks of the Court's time, GSK now expects the trial will  
23 be approximately 10 days. GSK respectfully submits that this significant reduction in the burden  
24 on the Court's time and resources will likely offset any inconvenience for the jury.

1 GSK has shown good cause for modifying the Court's schedule, and Abbott has failed to  
2 rebut GSK's showing by identifying any prejudice it faces. GSK respectfully requests that the  
3 Court grant the motion.

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6 Dated: March 9, 2015  
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9 /s/ Brian Hennigan  
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